

(2)
No. 90-1012

Supreme Court, U.S.

FILED

FEB 21 1991

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

ISABELLE M. WOODS, PETITIONER

v.

ANTHONY M. FRANK, POSTMASTER GENERAL

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

**BRIEF FOR THE RESPONDENT
IN OPPOSITION**

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

MARLEIGH D. DOVER
CATHERINE L. FISK
Attorneys

*Department of Justice
Washington, D.C. 20530
(202) 514-2217*

QUESTION PRESENTED

Whether the court of appeals erred in upholding the district court's grant of summary judgment against petitioner on her claim of discrimination on the ground that she failed to show any equitable relief to which she was entitled.



TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	i
Statement	2
Argument	4
Conclusion	8

TABLE OF AUTHORITIES

Cases:

<i>Aetna Life Insurance Co. v. Haworth</i> , 300 U.S. 227 (1937)	4
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986)	7
<i>Bennett v. Corroon & Black Corp.</i> , 845 F.2d 104 (5th Cir. 1988), cert. denied, 489 U.S. 1020 (1989)	4-5, 5-6
<i>Boddy v. Dean</i> , 821 F.2d 346 (6th Cir. 1987) ...	6
<i>City of Los Angeles v. Lyons</i> , 461 U.S. 95 (1983)	5
<i>DeFunis v. Odegaard</i> , 416 U.S. 312 (1974)	4
<i>Doe v. Marshall</i> , 622 F.2d 118 (5th Cir. 1980), cert. denied, 451 U.S. 993 (1981)	4
<i>Gladden v. Roach</i> , 864 F.2d 1196 (5th Cir.), cert. denied, 109 S. Ct. 3192 (1989)	5
<i>Matsushita Elec. Indus. Co. v. Zenith Radio Corp.</i> , 475 U.S. 574 (1986)	7
<i>Miller v. Texas State Board of Barber Examiners</i> , 615 F.2d 650 (5th Cir.), cert. denied, 449 U.S. 891 (1980)	5, 6
<i>Rogers v. Scurr</i> , 676 F.2d 1211 (8th Cir. 1982)	5
<i>Swanson v. Elmhurst Chrysler Plymouth, Inc.</i> , 882 F.2d 1235 (7th Cir. 1989), cert. denied, 110 S. Ct. 758 (1990)	6

IV

Cases — Continued:	Page
<i>United States v. (Under Seal)</i> , 757 F.2d 600 (4th Cir. 1985)	4, 6
<i>United States Postal Serv. Board of Governors v. Aikens</i> , 460 U.S. 711 (1983)	7
Constitution, statutes, and regulation:	
U.S. Const. Art. III	4, 6
Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e <i>et seq.</i> :	
42 U.S.C. 2000e-5(g)	4
42 U.S.C. 2000e-16(d)	4
29 C.F.R. 1613.221	2
Miscellaneous:	
<i>U.S. Postal Service Employee & Labor Relations Manual</i> , Issue 4 (Aug. 29, 1980)	2

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1012

ISABELLE M. WOODS, PETITIONER

v.

ANTHONY M. FRANK, POSTMASTER GENERAL

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 29-39) is unreported, but the decision is noted at 911 F.2d 728 (Table). The opinion of the district court (Pet. App. 17-27) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 1990, and a petition for rehearing was denied on September 6, 1990. Pet. App. 39-40. The petition for a writ of certiorari was filed on December 4, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In July 1986, petitioner, a black woman of Puerto Rican origin, was reassigned by her supervisor from her position as Manager of Retail Sales and Services at the Shreveport, Louisiana Management Sectional Center (MSC) of the United States Postal Service to the position of Manager of Station and Branch Operations at the Cedar Grove Station in Shreveport. Petitioner retained the same grade (level 18), salary step within grade (step 9), annual salary (\$39,803 at the time of transfer), and all other employment benefits that she enjoyed before the transfer. Pet. App. 19. Her reassignment was authorized by Section 353.2 of the Postal Service Employee and Labor Relations Manual, which permits "the permanent assignment, with or without relocation, of an employee," without his consent, "to another established position with the same grade in the same schedule" or "to a position with an equivalent grade in another schedule." After reassigning petitioner, her supervisor promoted Michael Smith, a white male, to petitioner's former position.

Petitioner filed an administrative complaint alleging that her transfer constituted discriminatory treatment based on her race, sex, and national origin. After a hearing, the Equal Employment Opportunity Commission (EEOC) administrative law judge (ALJ) recommended a finding of discrimination. Pet. 5-9. The Postal Service, which was not bound by the ALJ's findings or recommended decision, see 29 C.F.R. 1613.221, made a subsequent determination that her transfer was not discriminatory. Pet. App. 32. The EEOC Office of Review and Appeals upheld the Postal Service's determination, finding that the Postal Service had established legitimate nondiscriminatory reasons for reassigning petitioner, namely, to give her desirable experience in a position involving delivery of mail, and to fill a vacant man-

agerial position with an experienced, permanent manager. *Id.* at 26.

In January 1988, the Deputy Postmaster General eliminated petitioner's former position (then held by Smith) in all MSC facilities as part of a nationwide restructuring of the Postal Service. In the reorganization, the Postal Service created a grade level 21 position with the title MSC Director, Marketing. Both petitioner and Smith applied for the job, and both were interviewed. Smith ultimately was offered the position. Pet. App. 19-20.

Petitioner did not file an administrative complaint challenging the Postal Service's decision to promote Smith to the MSC Director, Marketing position. Pet. App. 20. Instead, she filed a complaint in the United States District Court for the Western District of Louisiana alleging that the Postal Service discriminated against her in reassigning her and in passing her over for promotion.

2. In an unpublished order, the district court granted summary judgment in favor of respondent. Pet. App. 17-27. The court held that petitioner had failed to establish that the Postal Service's reasons for transferring her were pretextual. *Id.* at 26. In any event, the court concluded, petitioner's discrimination claim was moot because there was no appropriate remedy available under Title VII. *Id.* at 23. Finally, the court dismissed the claim challenging the Postal Service's failure to select her for the MSC Director, Marketing position on the ground that she had not exhausted her administrative remedies. *Id.* at 25.

3. The Fifth Circuit affirmed in an unpublished order, holding that petitioner "had failed to show any equitable relief to which she is entitled." Pet. App. 37. The court noted that the elimination of petitioner's former job prevented her from being reinstated and that there was no need to award her an equivalent position because her current job was identical in pay and benefits and similar in responsibility to the

one from which she had been transferred. The court also concluded that she was not entitled to injunctive relief barring any future discriminatory actions because she had neither alleged nor proved that future discrimination was likely to occur. Nor was she entitled to back or front pay, since she had suffered no loss in pay, benefits, or rank. *Id.* at 36-37.

ARGUMENT

The court of appeals correctly applied settled law to the facts of this case. Its decision is not in conflict with the decisions of this or any other court. Further review is therefore not warranted.

1. Article III of the Constitution permits courts to resolve only "real and substantial controvers[ies] admitting of specific relief." *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 240-241 (1937). Where a court is unable to grant any "effective and suitable remedy," *United States v. (Under Seal)*, 757 F.2d 600, 603 (4th Cir. 1985), or where supervening events obviate the need for, or the possibility of, relief, there is no case or controversy for the court to resolve. See *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974); *Doe v. Marshall*, 622 F.2d 118 (5th Cir. 1980), cert. denied, 451 U.S. 993 (1981).

The court of appeals below correctly concluded that there was no remedy available to petitioner under Title VII for the alleged discriminatory transfer. If an employee has been the victim of employment discrimination, Title VII authorizes courts to order "reinstatement or hiring * * * with or without back pay * * * or any other equitable relief as the court deems appropriate." 42 U.S.C. 2000e-5(g). See 42 U.S.C. 2000e-16(d). On the basis of this language, the courts have concluded that "[o]nly equitable relief is available under Title VII." *Bennett v. Corroon & Black Corp.*, 845

F.2d 104, 106 (5th Cir. 1988), cert. denied, 489 U.S. 1020 (1989); see also *Miller v. Texas State Board of Barber Examiners*, 615 F.2d 650, 654-655 (5th Cir.), cert. denied, 449 U.S. 891 (1980). However, there is no appropriate equitable relief in this case. It is undisputed that petitioner's transfer to the position of manager of the Cedar Grove Station resulted in no loss of salary, grade level, or other job benefits. It is not possible to reinstate petitioner in her former position because that job was eliminated following her transfer; nor will petitioner benefit from the offer of another, similar position, since her current job is equivalent in all important respects to the one from which she was transferred. Finally, petitioner is not entitled to an injunction. Before an injunction may issue, "the court must determine that a cognizable danger of future violations exists and that danger must be more than a mere possibility." *Rogers v. Scurr*, 676 F.2d 1211, 1214 (8th Cir. 1982). "One seeking injunctive relief must demonstrate a real and immediate threat that he will be subject to behavior which he seeks to enjoin. It is not sufficient for the plaintiff to speculate that he will be subject to injurious conduct." *Gladden v. Roach*, 864 F.2d 1196, 1198 (5th Cir.), cert. denied, 109 S. Ct. 3192 (1989), citing *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). As the court of appeals recognized, petitioner fell far short of meeting this standard, since she failed either to allege or prove that there was a "real and immediate" threat that the Postal Service would discriminate against her in the future.¹ In sum, petitioner received all of the relief to which she could conceivably be entitled;

¹ The gravamen of petitioner's complaint appears to be that her transfer to the Cedar Grove position deprived her of the opportunity to function in a job that she presumably enjoyed. However, compensation in the form of nominal, compensatory, or punitive damages is a legal remedy unavailable under Title VII. See, e.g., *Bennett v.*

there was no further remedy available to her under by Title VII. Under these circumstances, the court of appeals was correct to uphold the grant of summary judgment in favor of respondent. That decision does not merit further review.²

2. The merits of petitioner's allegations of discrimination are irrelevant to the court of appeals decision, which did not address the district court's alternative basis for summary judgment — that petitioner failed to “present a material issue of fact to establish a *prima facie* case of * * * discrimination.” Pet. App. 26. However, that finding, which provides another valid basis for the ultimate disposition of this case, does not warrant further review by this Court.

Claiming that “this [was] not a matter suitable for summary judgment” (Pet. 11), petitioner requests review of the district court's conclusion that there was no disputed issue of material fact as to discrimination. See Pet. App. 26. According to petitioner, summary judgment is appropriate “only when [the] mover is entitled to relief beyond all

Corroon & Black Corp., 845 F.2d at 106; *Miller v. Texas State Board of Barber Examiners*, 615 F.2d at 654-655; *Swanson v. Elmhurst Chrysler Plymouth, Inc.*, 882 F.2d 1235, 1240 (7th Cir. 1989), cert. denied, 110 S.Ct. 758 (1990); *Boddy v. Dean*, 821 F.2d 346, 352 (6th Cir. 1987).

² Here, the court of appeals decided that petitioner was not entitled to any relief for alleged discrimination, regardless of whether her allegations have merit. In determining that her claim was therefore “moot,” the court of appeals recognized that it makes no difference whether, strictly speaking, there is no “controversy” in the Article III sense, or whether, instead, the resolution of a case can have no remedial consequences. In either instance, the result is the same: there is no point in judicial resolution of the issues. See *United States v. (Under Seal)*, 757 F.2d at 603 (“Passing the possibly difficult conceptual question of whether the appeal has been mooted in constitutional case or controversy terms, we conclude that, in any event, we should treat it as moot for prudential reasons.”).

doubt." Pet. 10. That, however, is not the standard. Rather, the party bearing the burden of proof can defeat a motion for summary judgment only by presenting "evidence on which the [trier of fact] could reasonably find" in his favor.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-252 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

In granting summary judgment for respondent, the district court justifiably concluded that petitioner, who bore the burden of proving discrimination, see *United States Postal Serv. Board of Governors v. Aikens*, 460 U.S. 711 (1983), failed to meet this standard. The Postal Service established before the court that petitioner's lateral transfer without loss of salary or job benefits was authorized by a regulation that granted the Service discretionary authority to make such transfers. The Postal Service further established that petitioner's transfer was made for the benefit of the Service and that it served legitimate business goals. Petitioner failed to submit to the district court any statements or affidavits disputing these facts, choosing, instead, to rely exclusively on the ALJ's proposed findings and recommended decision. See Gov't C.A. Br. 22. The ALJ's decision, however, did not constitute evidence of discrimination by the Postal Service. Nor was the decision binding on either the Postal Service or the district court. The district court was therefore correct to conclude that the legitimate business reasons advanced by the Postal Service for petitioner's transfer were essentially un rebutted.

But even if petitioner had properly admitted into evidence before the district court the hearing testimony that was the basis of the ALJ's decision, there would still be no warrant for review of the decision to grant summary judgment. There is no indication that, to the extent the district court appears to have considered this evidence, it applied the wrong legal standard for summary judgment. Rather, it is

apparent that the district court, in conducting *de novo* review, found insufficient evidence of pretext to support a judgment in petitioner's favor. See Pet. App. 26. The district court's determination is not clearly erroneous, and does not merit review by this Court. In any event, the district court's assessment of the evidence of discrimination was irrelevant to the decision of the court of appeals, which did not address the merits of the discrimination claim. For this reason as well, the case does not merit further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

MARLEIGH D. DOVER
CATHERINE L. FISK
Attorneys

FEBRUARY 1991